

**IN THE SUPREME COURT OF OHIO**

ORIGINAL

**FIRSTCAL INDUSTRIAL  
2 ACQUISITIONS, LLC.,**

**Appellant,**

**Case No. 2009-1505**

**Notice of Appeal from the Ohio Board  
Of Tax Appeals Case Nos. 2006-B- 1789  
1790; 1791;1792 consolidated**

**vs.**

**Franklin County Board of Revision,  
Franklin County Auditor, Boards of Education  
Of the South-Western City Schools and the  
Hilliard City Schools  
Appellants.**

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**APPELLANT'S REPLY BRIEF**

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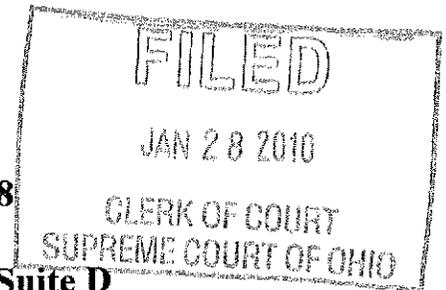
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## LEGAL ARGUMENT

The Ohio Supreme Court has established an affirmative duty to show that an allocation of a purchase price between parcels in one sale is proper. *St. Bernard Self-Storage, L.L.C. v. Hamilton County Bd. Of Revision, 115 Ohio St 3d 365, 2007-Ohio-5249, 875 N.E. 2d 85 at paragraph 19; Cummins Property Servs. , L.L.C. v. Franklin Cty. Bd. of Revision, 2008-Ohio-1473 .*

Clearly the transaction herein involved separate and distinct buildings on separate parcels in two separate tax districts. There was an affirmative duty on the part of the original BOR complainant ( the Board of Education) to come forward with probative evidence to support its allocation and the BOR could not make any arbitrary allocation without evidence to support such an allocation.

In *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision (1988), 82 Ohio St.3d 279* , the property involved consisted of two parcels with 2 separate buildings that were assessed for \$19,030,000 and were sold to taxpayer at a **combined price**, unallocated in the sale, for \$14,500,000. Both the BOR and BTA refused to separate the selling price between the two buildings ( \$14,500,000 ) leaving the buildings as

originally assessed at \$19,030,000. It is interesting to note that, in the dissent, at page 6, Justice Lundberg Stratton stated: “ Because I do not understand how the BTA can insist on taxing these two properties at a combined value of \$19,030,000, while agreeing that the true value is \$14,500,000, I must strongly dissent from the majority’s affirmance of the decision. I would find the decision to be arbitrary, unreasonable , and patently unfair.” *Id at 6.*

*In Corporate Exchange, BTA 95-A-464 ( April 18, 1997) as affirmed by the Court,* the BTA mandated that evidence as to the exact value of each of the two buildings was necessary and that an allocation would not be made without supporting evidence. Here the BOR reached a different result, presumptively because a tax **increase** was involved, whereas in *Corporate Exchange, supra,* **a decrease would be involved.** Thus similar fact patterns have the different application of law and analysis predicated on who gets the money, a distinction without a difference and a duplicitous view at that. Research by the undersigned counsel has not shown one instance wherein the BTA reduced tax valuations on unsupported allocations of a bulk sale of properties, yet has repeatedly accepted them

when increases in valuations would be involved , as in the present case.

The structures are dissimilar and the BTA is not required ( nor should the BOR be required) to accept an allocation of a lump-sum purchase of assets without an evidentiary basis. *Elsag-Bailey, Inc. v. Lake Cty. Bd. of Revision (1966), 74 Ohio St 3d 647; Consolidated Aluminum Corp. v. Monroe Cty. Bd. of Revision (1981), 66 Ohio St. 2d 410; Ashley Woods, L.P. v. Hamilton Cty. Bd. of Revision (Aug. 8, 2003), BTA 2003-V-90, unreported; Cross Country Inns, LLC. v. Hamilton Cty. Bd. of Revision (September 24, 2004), BTA 2003-A-1266, unreported.*

Moreover, only where the parcels are *IDENTICAL* is it not necessary to support an allocation of a lump sum transfer of numerous parcels. *Pingue v. Franklin Cty. Bd. of Revision (1999), 87 Ohio St. 3d 62. ( A bulk sale of identical condominium units in the same location).*

Before a county board of revision, the burden of proof or burden persuasion does not change and a complainant ( the BOE in this case) had the affirmative duty to prove its allocation of the transfer price among the parcels. *SEE: Cincinnati Bd. of Education v. Hamilton Cty. Bd. of Revision (1997), 78 Ohio St. 3d 325; Bd. of Edn. of the Columbus City*

*School Dist. v. Franklin Cty. Bd. of Revision ( Nov. 28, 1997)), BTA No. 1996-S-93 , unreported. The sole reason that the two school district complaints were consolidated before the BOR and BTA is due to the fact that only ONE tax conveyance form was filed listing only the BULK price for all of the properties and that conveyance form was the only evidence adduced.* Neither Board of Education herein can point to any evidence that would establish a separate and distinct value for each of these individual buildings, each in a different location, with differing construction, with different rent structures, different vacancies and occupancies , different market characteristics, different tenant finish ,utility and age condition.

A complainant before the BOR must demonstrate that the value which it seeks has any basis in the market. *SEE: Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. Of Revision (1994) 68 Ohio St. 3d 336, 337; Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision (1994), 68 Ohio St. 3d 493,495.*

To say that there was no evidence produced at the BOR hearing by the BOE, who had the burden of proof, as to the value of the dissimilar properties, is an understatement. At page two of the joint brief of these boards of education, there is a concocted set of calculations as to how the

values appealed were made. This factoring falls far short of an evidentiary basis for the board of revision values as affirmed by the BTA because there is no consideration for the age differences, locational differences etc. of the dissimilar properties. It is further to be remembered that this kind of allocation was rejected by both the BTA and Court in *Corporate Exchange*. The present matter is even worse where the allocation was done by virtue of a “desk appraisal allocation” by one of the employees of a law firm who did not even look at the various industrial buildings.

In *St. Bernard Self-Storage, LLC. V Hamilton Cty. Bd. Of Revision, 115 Ohio St. 3d 365, 2007-Ohio-5249* , the Court Stated:

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“ {T}he proponent of an allocation of sale price bears the initial burden of showing the propriety of the allocation” ( Id at 14).

And

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“ Bulk sales do differ, however, Unlike a simpler transaction Where a SINGLE PARCEL of real property is sold INDIVIDUALLY, A bulk sale may involve the sale of all of the assets of a business..... Alternatively, a bulk sale may consist of a sale of NUMEROUS real estate parcels at an aggregate price as part of A SINGLE DEAL. In All such cases, a question arises BEYOND THE BASIC PRONOUNCEMENT of *Berea*: **whether the proffered allocation of a bulk sale price to the particular parcel of real property is**

**‘proper’, which is the same as asking whether the amount allocated reflects the true value of the parcel for tax purposes.”**

( Id. At 15, emphasis added)

What if the law firm only represented one of the school districts involved herein and allocated all of the value change to property in its client’s jurisdiction? What if two different law firms represented the two appellee school districts and each firm allocated ALL of the increase to its separate client? Would the only evidence , ie. the bulk conveyance form listing all of the properties and one bulk sale price, pass muster as evidence? If that answer is in the negative why was that single form treated as unassailable evidence herein and the “ desk allocation” of counsel the final word as to the “ true value of the parcel(s) for tax purposes”?

Recently, in *Harp Midam Beachwood Hotel Investors, LLC. And Orange City School District Board of Education vs. Cuyahoga County Board of Revision and Cuyahoga County Auditor ( Ohio Board of Tax Appeals, unreported) BTA Case Nos. 2006-M-1629, 2006-M-1809, 2006-M-1810, (January 19, 2010) , Copy Appended , the BTA provides a lengthy discussion of the law with regard to the allocation of bulk sale prices. The BTA ignored its understanding of the law in this in this case.*

A MOST CURIOUS ARGUMENT IS MADE AT PAGE 13 OF THE BRIEF OF THE TWO SCHOOL BOARDS:

“ In its Merit brief, FirstCal relies primarily on the case of *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty Bd. Of revision (1998)*, 82 Ohio St. 3d 297, 695 N.E. 2d 743 for the claim that the boards of education were required to present evidence to the BOR or BTA proving how FirstCal had allocated the sale price to the five properties involved in the sale. Such a requirement would, of course, prevent the use of the sale price to value the properties because the Boards of Education did not have evidence relating to the allocations in its possession. ( Brief of Appellees at page 13)”.

The allocations were made by the counsel for the Boards of Education, and the mathematical process used by counsel for the Boards of Education was previously detailed in the same brief. It was these boards of education that filed the original complaint NOT THE TAXPAYER. Is it that the appellee boards had no evidence as to how they made their own Allocation , and if no evidence exists upon what evidence did the BOR and BTA rely? The simple answer is that there was no evidence and that the BTA decision is not only unlawful but is patently unreasonable.

It was improper for the BTA to “rubber stamp” the action of the board of revision without evidence as to the value of each of these separate buildings spread throughout two separate taxing districts .

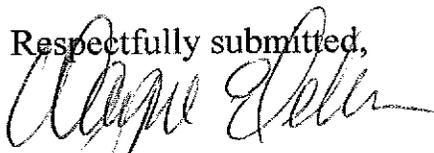
The arguments of Appellee's counsel as to discovery and statements of counsel as evidence are spurious in that available informational requests were fully complied with and both parties agreed to submit the matter on the record and briefs. The only issue was the propriety of the board of revision's acceptance of the allocation of the bulk sale made by counsel for the two boards of education. This Court has "not hesitated" to disregard a bulk sale of assets where the sale price could not be "properly allocated" , and a desk allocation by an attorney for a complainant board of education falls far short of a proper allocation, as evidenced by the fact that one property which was part of the BOE allocation actually sold within months of the bulk acquisition for less than the "allocated" amount shown on the complaints of these boards of education. Additionally, there was no evidence as to the value of these dissimilar properties.

One question that should be asked in a review of this appeal is whether the BTA ( and board of revision ) would have reached the same conclusions in accepting an allocation of the bulk sale if the taxpayer was proffering the allocation(s) to reduce the values of the transferred assets. It is respectfully suggested that the acceptance of a "desk" allocation to reduce the values would be unacceptable as having no evidentiary basis, yet such an

allocation herein by an entity not a party to the transaction was endorsed by the BTA. The review sought before the BTA involved the acceptance , without evidence as to individual values of the separate properties, of the allocations made by counsel for the boards of education and whether it was reasonable, lawful and proper to allow an attorney to make an allocation which is proffered as evidence.

Appellant requests the Court to answer in the negative and to reverse the Decision of the Board of Tax Appeals.

Respectfully submitted,



Wayne E. Petkovic (0027086)  
Attorney for Appellant

#### CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief was served upon all counsel of record by regular , prepaid U.S. Mail this 28<sup>th</sup> day of January, 2010.



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Wayne E. Petkovic

**OHIO BOARD OF TAX APPEALS**

Harp Midam Beachwood Hotel )  
Investors, LLC, and the Orange City School )  
District Board of Education, )  
Appellants/Appellees, )  
vs. )  
Cuyahoga County Board of Revision )  
and Cuyahoga County Auditor, )  
Appellees. )

CASE NOS. 2006-M-1629  
2006-M-1809  
2006-M-1810  
(REAL PROPERTY TAX)  
DECISION AND ORDER

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Entered **JAN 19 2010**

Ms. Margulies and Mr. Johrendt concur; Mr. Dunlap concurs separately.

These causes and matters come to be considered by the Board of Tax Appeals upon a notice of appeal filed by the property owner, Harp Midam Beachwood

Hotel Investors, LLC, and two notices of appeal filed by the Orange City School District Board of Education (“BOE”). The matters were consolidated by board order. The notices of appeal challenge a decision of the Cuyahoga County Board of Revision, appellee.

The subject property is located in the city of Orange taxing district of Cuyahoga County, Ohio, and further identified as parcel no. 901-01-003. The Cuyahoga County Auditor found the true and taxable value of the subject property for tax year 2005 to be as follows:

Parcel No. 901-01-003		
	True Value	Taxable Value
Land	\$ 1,706,300	\$ 597,210
Building	\$ 5,980,600	\$ 2,093,210
Total	\$ 7,686,900	\$ 2,690,420

Upon consideration of the complaint filed by the BOE and counter-complaint filed on behalf of the property owner, the Cuyahoga County Board of Revision (“BOR”) determined that the correct value for the subject property should be:

Parcel No. 901-01-003		
	True Value	Taxable Value
Land	\$ 1,706,300	\$ 597,200
Building	\$ 9,393,700	\$ 3,287,800
Total	\$11,100,000	\$ 3,885,000

Both the property owner and the BOE challenge the BOR’s value conclusion. The property owner seeks a return to the values assessed by the auditor while the BOE originally sought an increase in value to \$14,295,000.

The matter was submitted to the Board of Tax Appeals pursuant to R.C. 5717.01 upon the notice of appeal and the statutory transcript certified by the Cuyahoga County Auditor as secretary of the BOR. The board also held a hearing in this matter. At that hearing testimony was presented in support of the differing value assertions.

The subject property is a 2.5891-acre plat of land improved with a 113-room, multi-story hotel with dining room, fitness center, meeting room and business center. The property was originally constructed in 1994. The property suffered from mold problems and was closed in 2002. It was purchased in 2003 and fully renovated. S.T. BOR hearing tape. The hotel opened under the Marriot Courtyard flag and was sold as a going concern to its present owners.

At the hearing before this board the property owner presented the testimony of Mr. Graham Hershman.<sup>1</sup> Mr. Hershman began his career as a certified public accountant, but most of his career has been in the hotel industry, both in development and operations. Mr. Hershman was originally involved in the acquisition of the subject property by its current owner and retains a small interest in the limited liability company which holds title. H.R. at 65.

Mr. Hershman testified that he became involved in the acquisition of the property when one of his parties was contacted by a broker. Mr. Hershman visited the

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<sup>1</sup> Mr. Hershman also testified before the BOR.

property, did some due diligence, and presented financial pro formas. At that point, the matter was pursued by another partner. H.R. at 60-61.

At the time of closing, Mr. Hershman was again contacted and asked to divide the purchase price among the various components of the sale. In answer to the request, Mr. Hershman provided the following breakdown: Allocation to the "Courtyard flag" - \$5,000,000; Allocation to personalty - \$17,500 per room (x 113 rooms = \$1,977,500); allocation to realty - the remainder (\$8,247,500), divided 78 percent to building and 22 percent to land. Ex. Harp 5. In fact, the conveyance fee statement covering the subject property's purchase identifies a total consideration of \$15,225,000, and a consideration for the real property of \$8,247,500. S.T. Ex. D.

Mr. Hershman was later asked "to put a more detailed analysis together." H.R. at 77. Exhibit Harp 6 is the result of that more detailed analysis. Exhibit Harp 6 provides a "RevPar" for the property for the trailing 12 months<sup>2</sup> and a RevPar for a "competitive set" of hotels within the area. Mr. Hershman concluded that the affiliation with Marriott Courtyard brought additional value to the franchise (as opposed to the real estate). This value, capitalized at 12 percent, indicated an allocation of value to the business component of \$5,915,090. Adding that value to personal property (\$9,400 per room) of \$1,062,200, Mr. Hershman concluded that the non-realty components of the sale equaled \$6,977,290. H.R. 79-82. As a result of the

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<sup>2</sup> "RevPar" is the product of occupancy divided by average rate. *Second Berkshire Properties, LLC v. Cuyahoga Cty. Bd. of Revision*, infra. Mr. Hershman explained that "T12" means that the RevPar was calculated by using a "trailing 12 months" which in this case meant six months operated by the current owner and six months operated by the former owner H.R. at H.R. at 79..

allocation to non-realty components, the realty's value at the time of purchase, according to Mr. Hershman, was \$8,247,710.

The property owner also presented Exhibit Harp 1. This exhibit identifies suburban hotels within Cuyahoga County. The information, gleaned from the auditor's records, identifies each hotel by name, parcel number, and number of units. The exhibit identifies the last date of sale, and calculates a price per hotel room based upon the last transfer date.

The BOE presented Richard G. Racek, MAI, of Calabrese, Racek and Marko, Inc. Mr. Racek prepared a "self-contained appraisal report" of the subject property, concluding to a value of \$10,800,000. Mr. Racek presented value under two of the three accepted methods of valuing property, the sales comparison method, and the income capitalization method. While not preparing an opinion of value under the cost method of valuation, Mr. Racek did prepare a valuation analysis of the land as if vacant, concluding that 2.5891 acres would sell, if vacant, for \$600,000 per acre or a total of \$1,553,460.

Mr. Racek next considered value under the sales comparison approach. Through this approach, Mr. Racek identified five sales of hotel/motel properties he believed to be comparable to the property. Sale no. 1 is a sale of an 84-unit hotel in Upper Sandusky, constructed between 1987 and 1994 but 50 percent remodeled over the last five years. The property sold for \$2,850,000, with \$1,290,000 allocated to realty, and a unit price of \$33,529. Sale No. 2 is a 58-room hotel sold July 6, 2005 for

\$2,250,000, with a price of \$38,793 per room. Sale no. 3 is a 115-room hotel located in Westlake, Ohio, constructed in 1987, and sold in 2003 for \$2,275,000, or \$19,783 per room. Sale no. 5 is a 134-room hotel in Willoughby, Ohio, sold January 2005 for \$3,550,000, or \$26,493 per unit. Finally, sale no. 5 is a 86-room hotel in Solon, Ohio which sold September 2003 for \$10,050,000, or \$116,860 per room.

As to comparability, Mr. Racek testified that he developed only two units of comparison, the price per room and the gross room rent multiple. H.R. at 195. While all the sales were of limited service hotels, Mr. Racek indicated that there were significant physical differences in condition, location, room size, and amenities. Mr. Racek concluded that the room rent multiple, or a number obtained by dividing the revenue generated by the rooms into the purchase price, would not require adjustments driven by the market. H.R. at 203.

Using his comparable sales, the appraiser derived what he believed to be an appropriate gross room rent multiple. Mr. Racek then turned back to the subject. He utilized a gross room revenue of \$3,619,249 and a room rent multiple of 3.5. That produced a going concern value of \$12,667,371. The appraiser then subtracted the value for personal property of \$1,165,260 and concluded to a value for the real estate only of \$11,500,000, or \$101,770 per room. Mr. Racek testified that the \$101,770 per room fell within the range of his comparable sales.

Mr. Racek then considered value under the income capitalization approach. Mr. Racek first surveyed the greater Cleveland area and found 18 hotels

which he believed were comparable to the subject. He identified each hotel's room number, occupancy rate, average-daily-room rate, and room revenue. Mr. Racek also utilized actual financial information from the subject. From this information, the appraiser determined an average daily rate of \$117.00 and an average occupancy of 75 percent. Mr. Racek then included an amount of income for food and miscellaneous income and deducted expenses for room food and beverage, telephone, general and administrative, franchise and management fees and reserve for replacements. The appraiser derived net income of \$2,514,074. Applying a capitalization rate of 10 percent taken from the market plus a 2.6 percent tax additur, Mr. Racek concluded to a value of \$11,297,500. Deducting \$1,165,260 for personalty, Mr. Racek's final value conclusion under the income capitalization approach was \$10,150,000 (rounded). Correlating his values, Mr. Racek concluded to final value of \$10,800,000.

We begin our consideration of this matter by identifying our standard of review. A party who asserts a right to an increase or decrease in the value of real property has the burden to prove the right to the value asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence which demonstrates its right to the value sought. *Cleveland Bd. of Edn., supra*; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68

Ohio St.3d 493. Once an appellant has presented competent and probative evidence of true value, other parties asserting a different value then have a corresponding burden of providing sufficient evidence to rebut the appellant's evidence. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn.*, supra.

It is axiomatic that the best evidence of "true value in money" of real property is revealed by an actual, recent sale of the property in an arm's-length transaction. *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 120; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. See, also, *Reynoldsburg Bd. of Edn. v. Licking Cty. Bd. of Revision* (1997), 78 Ohio St.3d 543; *Dublin-Sawmill Properties v. Franklin Cty. Bd. of Revision* (1993), 67 Ohio St.3d 575. An arm's-length sale is comprised of three elements: 1) the sale is voluntary; 2) it generally takes place in an open market; and 3) the parties act in their own self-interests. *Walters v. Knox Cty. Bd. of Revision* (1988), 47 Ohio St.3d 23.

It is also well established that when a sale occurs, there is a rebuttable presumption that the sale price reflects the true value of the property in question. Consequently, a rebuttable presumption extends to all of the requirements which characterize true value. It is then the burden of the party who claims that the sale is other than arm's length to meet such a presumption. However, the burden of persuasion does not change, as it is still upon the appealing party to establish, through the presentation of competent and probative evidence, a different value than that which was found by the board of revision. See *Cincinnati Bd. of Edn. v. Hamilton*

*Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325; *Bd. of Edn. of the Columbus City School District v. Franklin Cty. Bd. of Revision* (Nov. 28, 1997), BTA No. 1996-S-93, unreported.

In the present appeal, we have before us sale evidence. The deed and the conveyance fee statement indicate that property transferred for a price of \$15,225,000. The property owner's representative confirmed that amount before this board. H.R. at 66.

The property owner, however, argues that something more than realty was sold in the transaction. The property owner claims that the sale of the hotel was a "bulk sale," a sale of an ongoing business, personalty used to operate the business, and realty upon which the business is operated. The property owner argues that the proper method to value such a bulk sale is an allocation of the sale price and cites to *Conalco v. Monroe Cty. Bd. of Revision* (1977), 50 Ohio St.2d 129.

In fact, the Ohio Supreme Court recently affirmed its holding in *Conalco* in *St. Bernard Self-Storage, L.L.C. v. Hamilton County Bd. of Revision*, 115 Ohio St. 3d 365, 2007-Ohio-5249. In that appeal, the court held:

"[T]he proponent of an allocation of sale price bears an initial burden of showing the propriety of the allocation. The starting point for our analysis is the settled proposition that 'the best evidence of "true value in money" is the proper allocation of the lump-sum purchase price and not an appraisal ignoring the contemporaneous sale.' *Conalco, Inc. v. Monroe Cry. Bd. of Revision* (1977), 50 Ohio St.2d 129, \*\*\*, paragraph two of the syllabus. We believe this principle fully comports with our more recent holding in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005 Ohio

4979, \*\*\*, that ‘when the property has been the subject of a recent arm’s-length sale between a willing seller and a willing buyer, the sale price of the property shall be “the true value for taxation purposes.”’ Id., quoting R.C. 5713.03. As a result, we view the *Conalco* syllabus as effectuating the Berea doctrine in the context of a bulk sale.” Id. at ¶14. (Parallel citations omitted.)

The court went on to explain what a bulk sale may consist of:

“Bulk sales do differ, however. Unlike a simpler transaction where a single parcel of real property is sold individually, a bulk sale may involve the sale of all the assets of a business, whereby a parcel of real property constitutes one of many business assets sold at the same time for an aggregate sale price. Alternatively, a bulk sale may consist of a sale of numerous real estate parcels at an aggregate price as part of a single deal. In all such cases, a question arises beyond the basic pronouncement of *Berea*: whether the proffered allocation of bulk sale price to the particular parcel of real property is ‘proper,’ which is the same as asking whether the amount allocated reflects the true value of the parcel for tax purposes.” Id. ¶15.

The court noted that it had “not hesitated” to disregard the price for which property sold when the sale price could not be “properly allocated,” citing *Consol. Aluminum Corp. v. Monroe Cty. Bd. of Revision* (1981), 66 Ohio St.2d 410, *Elsag-Bailey, Inc. v. Lake Cty. Bd. of Revision* (1996), 74 Ohio St.3d 647, 1996-Ohio-308, and *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297. However, in each of these cases, the court held that the allocation of a sale price was not supported by the evidence in the record.

More critical to our determination in the present appeal, however, is whether business value, or goodwill, is an allocable asset when the business being sold is dependent upon the realty. In *St. Bernard’s Storage*, the court affirmed this

board's finding that the property owner's business was to lease space. The court held that:

"The income generated by that business derives from St. Bernard's granting the right to use space, either outdoors or within the buildings, and the definition of real property for tax purposes encompasses "rights and privileges \* \* \* appertaining" to the land and improvements. R.C. 5701.02. As a matter of pure logic, rent revenue relates to such rights and privileges, and as a result constitutes a part of the value of real property. Accord *Dublin Senior Community Ctr., L.P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455, 460, \*\*\* (when using an income approach in valuing a senior care center, 'rental for the apartments' was deemed to constitute 'real estate activity' that relates to the value of the real estate, not to a separate business value)." Id. at ¶24. (Parallel citations omitted.)

In the present appeal, the subject hotel is a "limited services" hotel. The bulk of the income earned by the hotel is from the rental of space. BOE Ex. C, Addendum, Current Year Earnings Statement, compare room revenue with food, beverage, banquet revenue. It follows, then, that the bulk of the value transferred is value which should be allocated to the realty, as opposed to the "going concern" or "goodwill."

But what of the property owner's claim that the Marriott Courtyard brand itself creates value? A similar claim was rejected by this board in *Kettering City Schools v. Montgomery Cty. Bd. of Revision* (Oct. 23, 2003), BTA No. 2002-G-1922, unreported. In that appeal, a Holiday Inn located in Montgomery County had recently sold in a complex transaction involving the transfer of ownership of hotels both within and without the state. This board concluded that the sale transaction

qualified as an arm's-length sale. The board then addressed the property owner's claim that assets besides the realty were transferred as a part of the sales transaction. The property owner had presented the testimony of an appraiser who attempted to allocate the sale price among the realty, personalty, and "business and other intangibles." The board rejected the property owner's claim that the sale price included a "business enterprise value," concluding that the amount attributed to that value was speculative at best. See, also, *Equistar Cleveland, LLC v. Cuyahoga Cty. Bd. of Revision* (Aug. 6, 2004), BTA No 2002-J-2430, et seq., unreported.

We find this position supported by more recent Supreme Court cases. In *Rhodes v. Hamilton County Bd. of Revision*, 117 Ohio St. 3d 532, 2008-Ohio-1595, the property owner argued that the price for which a property recently sold should be discounted because the property was encumbered by a lease to a national retailer. That long-term lease, according to the property owner, established a separate "business value" component to the sale price. The court disagreed, ultimately determining that the "business value" component was nothing more than the right to collect the above-market rents. See, also, *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473; *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St.3d 563, 2008-Ohio-5203.

In the present case, we can find only a small portion of the business, i.e., the food and banquet services, that may be considered to have a business value outside

the realty. See *Dublin Senior Community Ctr., L.P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455. However, the property owner provided no allocation of value separate from the value assigned to the Marriot Courtyard flag. Therefore, the board will deduct the personalty as shown on the previous owner's personal property tax return from the sale price and conclude that the value of the subject property is \$14,100,000 (rounded).

In making this determination, we acknowledge that the BOE's appraiser's opinion of value is less than the value that we have found. We must conclude, however, that the court's instructions regarding sale cases have been clear. Since *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005 Ohio 4979, the court has consistently held that a sale price controls, regardless of encumbrances. *Cummins*, supra; *AEI Net Lease Income & Growth Fund*, supra. Given the current law, we are unable to conclude that an appraiser's opinion of value is entitled to more weight than an arm's-length sale. As the property owner has not challenged the arm's-length nature of the sale, we find that the sale price controls. *Colonial Village Ltd. v. Washington Cty. Bd. of Revision*, 123 Ohio St.3d 268, 2009-Ohio-4975.

Accordingly, upon consideration of the existing record and the applicable law, the Board of Tax Appeals finds and determines that the value of the subject property as of January 1, 2005 was:

Parcel No. 901-01-003

	True Value	Taxable Value
Land	\$ 1,706,300	\$ 597,200
Building	\$12,393,700	\$ 4,337,800
Total	\$14,100,000	\$ 4,935,000

It is the order of the Board of Tax Appeals that the Auditor of Cuyahoga County list and assess the subject real property in conformity with this decision and order. It is further ordered that this value be carried forward in accordance with the law.

Mr. Dunlap concurs separately.

While I agree with the preceding valuation determination, I write separately to amplify the reasons for my concurrence. The parties concede the subject sale was transacted at arm's length and was, apparently, sufficiently recent. However, each submitted a full appraisal with supporting testimony. The property owner's expert allocated the purchase price to support a proposed reduction of the value found by the BOR, whereas the BOE presented what is essentially a defensive opinion of value "should the sale not control the value of the property."

Prevailing case law has evolved so that once it has been established a recent, arm's-length sale transferring a subject has occurred, it is less likely, absent explicit circumstances, that factors allegedly influencing the sale price will be accepted to support a reduction in the property's real estate tax valuation. While the value of transferred personalty, if sufficiently demonstrated, may be subtracted from the purchase price of the real estate transferred, the alleged value of intangible assets,

purportedly part of the sale, are generally not recognized as affecting a determination of the value of real property. Until specifically recognized judicially to reduce valuation, assets other than realty or personal property, while perhaps components of a sale price, presently do not impact real property tax values unless precisely separate and capable of unqualified, non-speculative allocations.

In this case, the value of "the business and other intangibles" was opined rather than specified separately in the purchase documents or in some mode other than supposition. Accordingly, based on the record, the authority cited and the decision's corresponding analysis, I agree with the outcome.

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I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Sally F. Van Meter, Board Secretary